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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1899

BOARD OF EDUCATION OF NEWTON, NEW JERSEY, *et al.*,

Petitioners,

vs.

STATE BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

Counter-Statement of Question Presented

Is a governmentally sponsored religious exercise held on school premises immediately prior to the opening bell each morning violative of the Establishment Clause of the First Amendment to the United States Constitution as interpreted by the Court in *Engel* v. *Vitale*, 370 U. S. 421 (1962) and *School District of Abington Twp.* v. *Schempp*, 374 U.S. 203 (1963).

Counter-Statement of Case

In response to a request by the State Commissioner of Education, the Attorney General of New Jersey on November 24, 1969, issued a formal opinion declaring the school prayer program instituted by the Board of Education of Netcong to be violative of the Establishment Clause of the First Amendment to the United States Constitution. After unsuccessful attempts by the Commissioner and the State Board of Education to cause the cessation of the prayer program, a complaint was filed in the Superior Court, Chancery Division, to obtain a judicial declaration of the unconstitutionality of the program and to enjoin its implementation. At that point the parties, each of whom was represented by counsel, entered into an Agreed Stipulation of Facts; the matter was considered on cross motions for summary judgment, the prayer program declared to be unconstitutional, and an injunction was issued.

After an appeal had been taken, petitioners filed a substitution of attorney (A41a).[1] On April 21, 1970, the newly substituted attorney, who represents petitioners herein, made a motion before the Superior Court, Appellate Division to settle the facts upon which the appeal was based and, in effect, to change the stipulation upon which the case had been tried (A33a). On May 7, 1970, the Appellate Division denied petitioners' motion to change the stipulation upon which the case had been tried below (A40a). Accordingly, when the case was subsequently certified to the New Jersey Supreme Court without argument in the Appellate Division, the only facts considered by that court were those contained in the stipulation.

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[1] A—a refers to the appellants' appendix filed in the Appellate Division.

This stipulation differs in certain respects from the facts presented by petitioners' petition for writ of certiorari to this Court. For example, paragraph four of the stipulation is completely missing from the facts presented in petitioners' petition. Paragraph four reads as follows:

> "4. On September 2, 1959, the Board of Education of Netcong enacted the following resolution:
>
> 'That the Superintendent be instructed by the Board of Education to institute prayers in the Netcong schools, forcing no student to pray if unwilling but denying no student the right to pray, details to be worked out by the Board of Education.'
>
> It was further resolved that:
>
> 'Members of the clergy from the communities of Netcong and Stanhope be invited to meet with representatives of the Board of Education and compose a suitable prayer for the Board's consideration. In the interim, the Superintendent is instructed to institute 30 seconds of silent meditation until the Board takes further action." (Ab2).[*]

In addition, paragraph seven of the Agreed Stipulation (Ab4), describing the manner in which the prayer program was implemented has been considerably altered in the petition. Paragraph seven of the stipulation reads as follows:

> "7. The implementation of the resolution has occurred in the following way: At 7:55 a.m. in the

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[*] Ab— refers to the appellants' brief filed in the Appellate Division.

Netcong High School gymnasium, prior to the formal opening of school, the students who wish to join in the exercise either sit or stand in the bleachers. A student volunteer reader, assigned by the principal on a first come, first served basis, then comes forward and reads the 'remarks' of the chaplain from the Congressional Record, giving the date, volume, number and body whose proceedings are being read. The selection of material to be read is made by the volunteer reader with the approval of the high school principal in a purely ministerial fashion to insure that the material used complies with the evinced purposes of the Board's resolution. The volunteer reader is free to add remarks concerning such subjects as love of neighbor, brotherhood and civil responsibility, etc. At the conclusion of the reading, the students are asked to meditate for a short period of time either on the material that has been read or upon anything else they desire."

This paragraph sets forth all of the agreed factual circumstances surrounding the implementation of the religious exercise program in question.

Accordingly, it is respectfully submitted that since the stipulation was agreed upon by the parties and was the only factual material before the trial court and the Supreme Court of New Jersey, the petition for a writ of certiorari must be considered on the basis of those facts not upon the hypothetical facts set forth in the petitioners' statement of the case.

ARGUMENT

Certiorari should be denied because the religious exercise program which the Court below found to be in violation of the First Amendment to the United States Constitution is not meaningfully different from the religious programs declared unconstitutional by this Court in *Schempp* and *Engel*.

The Supreme Court of New Jersey, in affirming the decision of the lower court which invalidated the Netcong school prayer exercise on Establishment Clause grounds, succinctly stated the nature of this case:

> "We find no meaningful difference between the program involved in this case and the programs which the United States Supreme Court held to violate the Establishment Clause of the First Amendment in *Engle* v. *Vitale*, 370 U. S. 421, 8 L. Ed. 2d 601 (1962), and *School District of Abington Twp.* v. *Schempp*, 374 U. S. 203, 10 L. ed. 2d 844 (1963). The judgment is therefore affirmed." (P2a).

In *Engel*, 370 U. S. 421 (1962) the State of New York adopted a voluntary program of denominationally neutral prayer in the public school classrooms. This Court found the program to be in violation of the Establishment Clause because it placed the power, prestige and financial support of government behind a religious exercise, notwithstanding the prayer was nondenominational and that those students who wished to do so could remain silent or leave the room.

The statute considered by this Court in *School District of Abington Township* v. *Schempp*, 374 U. S. 203 (1963) provided:

> "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." 374 U. S. at 205.

As in *Engel*, this Court declared:

> "Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools." 374 U. S. at 223.

This Court therefore held the program to be in conflict with the First Amendment, even though participation was voluntary, since voluntariness is irrelevant to a violation of the Establishment Clause.

It is respondents' position that the Netcong exercise falls squarely within the reasoning of *Schempp* and *Engel*, and that the Establishment Clause in this context has no meaning if it does not proscribe a religious exercise sponsored at school by government. When tested against the rationale of the school prayer cases, the Netcong program emerges as a clear violation of the Establishment Clause.

On September 2, 1969, the petitioner Board of Education enacted a resolution to the effect that "the Superintendent [of schools] be instructed . . . to *institute prayers*

in the Netcong schools" (emphasis added). On September 10, 1969, the Board rescinded the resolution of September 2, 1969 and enacted another resolution which provided in part for a period prior to the opening of school for "the free exercise of religion." On September 16, 1969, the Board enacted the following:

> "Be It Resolved that the Superintendent of Schools be *authorized, empowered and directed* to implement the resolution creating a period for the free exercise of religion in whatever manner, in the exercise of his discretion, he considers best under the circumstances." (Emphasis added.)

Thus, this admittedly religious exercise has been superimposed upon the public school system solely by virtue of governmental action. It would not exist but for the resolution of the Board of Education creating it and directing school officials to implement it. It is in no sense a spontaneous outpouring on the part of the students at Netcong High School, but is a carefully constructed program carried out by order of the Board, on school premises, with the assistance of the principal. In other words, it is a religious exercise required to be held by government and as such contravenes the provisions of the First Amendment.

Plaintiffs rely on the voluntary nature of the exercise and the fact that it is held in the gymnasium to free the program from the proscriptions of the First Amendment. Although voluntariness is a critical consideration in a Free Exercise case, it is clearly irrelevant to a claim based upon the Establishment Clause. In both *Schempp* and *Engel*, the observance which was declared unconstitutional was made voluntary through the use of an excusal procedure, and in both cases this Court rejected petitioners' contention:

> "Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See *Engel* v. *Vitale*, *supra* (370 U. S. at 430)." *School District of Abington Twp.* v. *Schempp*, 374 U. S. at 225.

Petitioners here claim a distinction in that the student at Netcong must take the affirmative initiative to attend the service, whereas, in *Schempp* and *Engel* there was a negative burden of electing not to participate. In other words, what is involved here is a more elaborate form of pupil excusal. But, whether the burden of avoidance is positive or negative is inapposite in an Establishment Clause case. The real issue is not whether a child is compelled to attend the service, or with what ease he may avoid it, but only whether the service is officially sponsored by the government. Here, the Board of Education of Netcong resolved to impose upon the school system a religious exercise period and directed compliance therewith by school officials. The service is held on school grounds, with the principal approving the selection of materials and assigning volunteer readers. In other words, the government has participated in, sponsored, and in fact superimposed a religious exercise on the public education structure. This clearly places the power, support, and prestige of government behind a religious exercise in contravention of the Establishment Clause. In this situation voluntariness and excusal have no meaning: As the Supreme Court of New Hampshire recently noted:

> "It is clear that if government prescribed an exercise the primary purpose of which is religious, the establishment clause is violated even though ob-

servance on the part of the students is voluntary." *Opinion of the Justices*, 223 A. 2d 161, 163 (1967).

Petitioners cite *Reed* v. *Van Hoven*, 237 F. Supp. 48 (W. D. Mich. 1965) and *Stein* v. *Oshinsky*, 348 F. 2d 999 (2nd Cir. 1965) for the proposition that federal courts have declared exercises similar to those at Netcong valid subsequent to *Schempp* and *Engel*. But the court in *Reed* specifically declined to rule upon the constitutionality of its own plan and in fact stated: "This approach is by no means a final judgment of the court, nor should it be taken as a preliminary indication of a final judgment". 237 F. Supp. at 56. Further, recognining that its plan was far from secure as against the proscriptions of the First Amendment, the court went on to say:

> "However, even should the program successfully escape the prohibitions of the Establishment Clause, as administered it may possibly result in an abridgement of the rights of free exercise . . ." 237 F. Supp. at 57.

Thus *Reed* is, in fact, nothing more than an interim order which even in the eyes of the issuing court did not adjudicate the merits of the claim before it. As such, it is hardly a precedent for petitioners' cause here. Of *Stein* v. *Oshinsky* no more need be said than that it concerned a spontaneous outpouring of student-initiated prayers involving neither support, direction or even the slightest connection with school officials. Assuming, *arguendo*, the relevance of *Reed* and *Stein*, even petitioners concede that they rest on the rationale of the dissenting opinion in *Schempp* (Pb11).

What is more significant than the decisions in *Reed* and *Stein* is the fact that there has been very little litigation

involving school prayer issues since this Court's decisions in *Engel* and *Schempp*. This indicates that while the decisions may have generated some public controversy, there has been little doubt legally as to their meaning and intent and that petitioner's allegations regarding confusion and uncertainty are unfounded.

Finally the issue confronting the Court in this matter is constitutionally indistinguishable from that considered in the decisions in *Schempp* and *Engel*. In this respect, it is well established that where cases before the Court are in all essential particulars like other cases previously decided, the Court should invoke the doctrine of *stare decisis*. *United States* v. *Hatch*, 154 U. S. 596, (1874). Unless clearly convinced of a former error of its decision on a constitutional matter, this Court should seek continuity in its decisions regarding the United States Constitution. *Smith* v. *Allwright*, 321 U. S. 648 (1943). Accordingly, it is respectfully submitted that since the issue presented in this case is constitutionally indistinguishable from the issues presented in *Schempp* and *Engel*, it should be resolved on the basis of the decisions in those cases.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
Attorney for Respondents.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

VIRGINIA LONG ANNICH,
Deputy Attorney General,
On the Brief.